A

## YEOH POH SAN & ANOR v. MAJLIS PEGUAM

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
ALIZATUL KHAIR OSMAN JCA
LIM YEE LAN JCA
B [CIVIL APPEAL NO: W-02-3073-2009]
28 SEPTEMBER 2015

***LEGAL PROFESSION:*** *Practise of law – Unauthorised person – Complaint by Bar Council to Disciplinary Board – Clients' account – Allowing person not an advocate and solicitor to sign cheques – Whether contravened s. 82(2) of Legal Profession Act 1976 – Whether explanation had merits – Whether appointment of Disciplinary Committee compulsory – Whether Disciplinary Board entitled to dismiss Bar Council's complaint*

***LEGAL PROFESSION:*** *Practise of law – Misconduct – Complaint by Bar Council to Disciplinary Board – Disciplinary Board dismissed Bar Council's complaint – Appeal to High Court – Whether High Court Judge erred in compelling Disciplinary Board to proceed with disciplinary action – Whether High Court Judge usurped statutory powers of Disciplinary Board*

The appellants were advocates and solicitors practising as partners in the name of Messrs Harun Idris, Yeoh & Partners. The Bar Council had lodged a complaint to the Disciplinary Board pursuant to s. 99(3) of the Legal Profession Act 1976 ('the Act') against the appellants for allowing a person by the name of Choo Lee Chin ('Choo'), who was not an advocate & solicitor and therefore by definition an 'unauthorised person' under s. 36(1) of the Act, to sign a cheque in favour of one Ng Siong Toke ('Ng'). The said cheque was drawn on a client account of the legal firm. The Bar Council's complaint was that by allowing Choo to sign the cheque, the appellants had contravened s. 82(2) of the Act and r. 11(6) of the Solicitors' Account Rules 1990 ('the Rules') which *prima facie* would amount to a misconduct under sub-s. 94(3)(k) and (o) of the Act. The appellants, through their letters to both the Bar Council and the Disciplinary Board explained, *inter alia*, that Choo, who was the manager of the legal firm could be a co-trustee cum authorised signatory of the account. The Disciplinary Board referred the appellants' explanation to the Bar Council but the Bar Council rejected the explanation on the ground that even if Choo was authorised by the beneficiaries to the account, s. 78(3)(c) related to the application of the trust monies but did not relate to the manner in which a client account was to be operated, and therefore, r. 11(6) of the Rules would still apply. The Disciplinary Board dismissed the Bar Council's complaint. The Disciplinary Board reasoned that the appellants' explanation had merits, as there was a conflict between s. 82(2) and s. 78(2) of the Act and r. 11(6) of the Rules, and the appellants should

be given the benefit of the doubt while the Bar Council should amend s. 78(2)(a) and the Rules. Dissatisfied with the decision of the Disciplinary Board, the Bar Council appealed to the High Court in which it sought (i) an order to set aside the decision of the Disciplinary Board; (ii) an order directing the Disciplinary Board to hold a formal complaint against the appellants and for that purpose to appoint a Disciplinary Committee to hear and determine the Bar Council's complaint pursuant to s. 100(3) of the Act. The High Court allowed the Bar Council's appeal. Hence, the present appeal.

**Held (allowing appeal with no order as to costs)**
**Per Lim Yee Lan JCA delivering the judgment of the court:**

**(1)** Under para. 94(3)(k), the Bar Council relied on the appellants' breach of s. 82(2) of the Act which prohibits a legal firm from allowing a person who is not an advocate and solicitor to draw a cheque in respect of moneys standing or forming part of a client's account of the legal firm. Under s. 100(3) of the Act, where the advocate and solicitor has furnished his written explanation to the Disciplinary Board, the Disciplinary Board may, if it is satisfied that there is no merit in the application or complaint, dismiss the application or complaint. (paras 24 & 26)

**(2)** The factual scenario does not fall under the circumstances specified in s. 103A(1)(b) and (c), where the appointment of a Disciplinary Committee is compulsory. From its decision conveyed to the Bar Council, the Disciplinary Board obviously did not think that it ought to refer the complaint to a Disciplinary Committee for an inquiry to be held. Instead, the Disciplinary Board after reviewing the explanation of the appellants had decided that there was no merit in the application and had exercised its power under s. 100(3)(a) to dismiss the complaint of the Bar Council. (paras 25, 31 & 32)

**(3)** Having regard to the various provisions of the Act relating to the statutory powers of the Disciplinary Board, the trite legal principle on appellate intervention with the decision of the Disciplinary Board, and the factual matrix in this case, the court was not in a position to say that the Disciplinary Board's decision was plainly wrong or perverse. Neither was there such an exceptional case or compelling grounds for the High Court to interfere with the Disciplinary Board's decision not to proceed with the complaint. (para 33)

**(4)** The High Court Judge, in purporting to compel the Disciplinary Board to proceed with disciplinary action against the appellants and requiring it to appoint a Disciplinary Committee to inquire into the matter, failed to appreciate the provisions of the Act and appeared to have usurped the statutory power of the Disciplinary Board, especially its power to

A determine when a Disciplinary Committee should be appointed as well as its power to dismiss a complaint at any stage of the proceedings. Therefore, based on the facts, the High Court Judge had erred in principle when she had set aside the decision of the Disciplinary Board and granted the orders sought by the Bar Council. (para 34)

B ***Bahasa Malaysa*** *Translation Of Headnotes*

Perayu-perayu adalah yang beramal sebagai peguambela dan peguamcara rakan kongsi di bawah nama Tetuan Harun Idris, Yeoh & Partners ('firma'). Majlis Peguam telah membuat aduan kepada Lembaga Tatatertib menurut
C s. 99(3) Akta Profesion Undang-Undang 1976 ('Akta') terhadap perayu-perayu kerana membenarkan Choo Lee Chin ('Choo'), bukan seorang peguambela dan peguamcara dan oleh itu ditakrifkan sebagai 'unauthorised person' di bawah s. 36(1) Akta, untuk menandatangani cek memihak kepada Ng Siong Toke ('Ng'). Cek tersebut dikeluarkan daripada akaun klien firma tersebut. Aduan Majlis Peguam adalah bahawa dengan membenarkan Choo
D untuk menandatangani cek tersebut, perayu telah melanggar s. 82(2) Akta dan k. 11(6) Kaedah-Kaedah Akaun Peguamcara 1990 ('Peraturan') yang secara *prima facie* akan terjumlah kepada satu salah laku di bawah sub-s. 94(3)(k) dan (o) Akta tersebut. Perayu, melalui surat mereka kepada Majlis Peguam dan Lembaga Tatatertib menjelaskan, antara lain, bahawa
E Choo, pengurus firma guaman tersebut, boleh menjadi penandatangan pemegang amanah bersama akaun tersebut yang dibenarkan. Lembaga Tatatertib merujuk penjelasan perayu-perayu kepada Majlis Peguam tetapi Majlis Peguam menolak penjelasan tersebut atas alasan bahawa walaupun Choo diberi kuasa oleh benefisiari kepada akaun tersebut, s. 78(3)(c)
F berkaitan dengan penggunaan wang amanah tetapi tidak berkait dengan cara bagaimana akaun klien harus dikendalikan, dan oleh itu, k. 11(6) Peraturan masih terpakai. Lembaga Tatatertib menimbangkan aduan tersebut dan memutuskan untuk menolak aduan Majlis Peguam. Lembaga Tatatertib berpendapat bahawa penjelasan perayu-perayu bermerit, kerana terdapat
G percanggahan antara ss. 82(2) dan 78(2) Akta dan k. 11(6) Peraturan dan perayu perlu diberi manfaat keraguan manakala Majlis Peguam perlu meminda s. 78(2)(a) dan Peraturan. Tidak berpuas hati dengan keputusan Lembaga Tatatertib, Majlis Peguam merayu kepada Mahkamah Tinggi di mana ia memohon (i) suatu perintah untuk mengetepikan keputusan Lembaga Tatatertib; dan (ii) suatu perintah yang mengarahkan Lembaga
H Tatatertib untuk mengadakan aduan rasmi terhadap perayu dan untuk melantik suatu Jawatankuasa Tatatertib untuk mendengar dan memutuskan aduan Majlis Peguam menurut s. 100(3) Akta. Mahkamah Tinggi membenarkan rayuan Majlis Peguam. Oleh itu, rayuan ini.

I

**Diputuskan (membenarkan rayuan tanpa perintah mengenai kos)**
**Oleh Lim Yee Lan HMR menyampaikan penghakiman mahkamah:**

**(1)** Di bawah per. 94(3)(k) Akta, Majlis Peguam bergantung kepada pelanggaran s. 82(2) Akta oleh perayu yang melarang sebuah firma daripada membenarkan seseorang yang bukan seorang peguambela dan peguamcara untuk mengeluarkan cek berkenaan dengan wang yang ada atau yang menjadi sebahagian daripada akaun klien firma. Di bawah s. 100(3) Akta, apabila peguambela dan peguamcara telah memberi penjelasan secara bertulis kepada Lembaga Tatatertib, Lembaga Tatatertib boleh, jika berpuas hati bahawa tiada merit dalam permohonan atau aduan, menolak permohonan atau aduan.

**(2)** Fakta ini tidak terjumlah di bawah hal keadaan yang dinyatakan dalam s. 103A(1)(b) dan (c), di mana pelantikan suatu Jawatankuasa Tatatertib adalah wajib. Jelas daripada keputusan yang disampaikan kepada Majlis Peguam bahawa tidak terlintas di fikiran Lembaga Tatatertib bahawa perlu untuk merujuk aduan tersebut kepada Jawatankuasa Tatatertib untuk menjalankan siasatan. Sebaliknya, selepas mengkaji penjelasan perayu, Lembaga Tatatertib telah memutuskan bahawa tiada merit dalam permohonan dan melaksanakan kuasanya di bawah s. 100(3)(a) untuk menolak aduan Majlis Peguam.

**(3)** Mengambil kira pelbagai peruntukan Akta berhubung dengan kuasa statutori Lembaga Tatatertib, prinsip mantap campur tangan rayuan dengan keputusan Lembaga Tatatertib, dan fakta matriks dalam kes ini, mahkamah tidak berada dalam kedudukan untuk menyatakan bahawa keputusan Lembaga Tatatertib jelas salah atau bertentangan. Begitu juga tiada kes yang luar biasa atau alasan-alasan yang mendesak Mahkamah Tinggi campur tangan dalam keputusan Lembaga Tatatertib untuk tidak meneruskan dengan aduan tersebut.

**(4)** Hakim Mahkamah Tinggi, dengan memaksa Lembaga Tatatertib mengambil tindakan tatatertib terhadap perayu dan menghendakinya melantik suatu Jawatankuasa Tatatertib untuk menyiasat perkara tersebut, gagal mempertimbangkan peruntukan Akta dan telah merampas kuasa statutori Lembaga Tatatertib, terutama sekali kuasanya untuk menentukan apabila suatu Jawatankuasa Tatatertib perlu dilantik dan juga kuasanya untuk menolak aduan di mana-mana peringkat prosiding. Oleh itu, berdasarkan fakta, Hakim Mahkamah Tinggi terkhilaf dalam prinsip mengetepikan keputusan Lembaga Tatatertib dan membenarkan perintah-perintah yang dipohon oleh Majlis Peguam.

**Case(s) referred to:**

*Au Kong Weng v. Bar Committee, Pahang [1980] 1 LNS 4 FC* ***(refd)***

*China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC* ***(refd)***

*Eng Thye Plantations Bhd v. Lim Heng Hock & Ors [2001] 4 CLJ 245 CA* ***(refd)***

*Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC* ***(refd)***

A *Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA* ***(refd)***
*Marzaini Zainuddin v. Majlis Peguam Malaysia [2007] 10 CLJ 339 HC* ***(refd)***
*Sivalingam Periasamay v. Periasamy & Anor [1996] 4 CLJ 545 CA* ***(refd)***

**Legislation referred to:**
Legal Profession Act 1976, ss. 36(1), 78(1), (2)(a), (3)(c), 82(1), (2), (3), 93(1),
B (3)(a), (b), (c), 94(1), (2), (3)(k), (o), 96, 99(3), 100(3)(a), (b), 103A(1)(a), (b), (c), (2), 103B, 103C, 103D
Solicitors' Account Rules 1990, rr. 2, 4(a), 11(6)

*For the appellants - Matthias Chang (Manjit Singh Saini with him); M/s Harun Idris, Yeoh & Partners*
*For the respondent - Ahmad Moosdeen; M/s Chan, Moosdeen & Partners*
C
*Reported by Sandra Gabriel*

## JUDGMENT

**Lim Yee Lan JCA:**
D

**Introduction**

**[1]** This appeal by the appellants is against the decision of the Kuala Lumpur High Court dated 14 December 2009, in allowing the Bar Council's appeal against the decision of the disciplinary board made on 9 December
E 2008.

**[2]** The disciplinary board in its decision dated 9 December 2008 had dismissed the Bar Council's complaint against the appellants for misconduct under the Legal Profession Act 1976 ("the Act").

F **[3]** We had earlier allowed the appeal of the appellants and set aside the order of the High Court. These are the reasons for our decision.

**Brief Facts**

**[4]** The appellants were and still are advocates and solicitors practicing as partners in the name of Messrs Harun Idris, Yeoh & Partners ("the legal
G firm").

**[5]** The Bar Council had earlier made a complaint to the disciplinary board pursuant to s. 99(3) of the Act against the appellants for allowing a person by the name of Ms Choo Lee Chin ("Ms Choo"), who was not an
H advocate & solicitor and therefore by definition an "unauthorised person" under s. 36(1) of the Act, to sign a cheque for the sum of RM500,000 in favour of one Ng Siong Toke ("Mr Ng").

**[6]** The cheque concerned was drawn on a client account of the legal firm ("the account").

I **[7]** The Bar Council's complaint is that by allowing Ms Choo to sign the cheque, the appellants had contravened s. 82(2) of the Act and r. 11(6) of the Solicitors' Account Rules 1990 ("the Rules") which *prima facie* would amount to a misconduct under sub-ss. 94(3)(k) and (o) of the Act.

**[8]** For ease of reference, ss. 82(2), 94(3)(k) and (o) and r. 11(6) of the Rules are set out as follows:

Section 82(2)

No advocate and solicitor shall authorise any unauthorised person to operate any bank account in his name or in the name of his firm and maintained by him or his firm in connection with his practice as an advocate and solicitor.

Rule 11(6) of the Rules:

Unless authorised in writing by the Bar Council, no money may be withdrawn from a bank account, being or forming part of a client account, otherwise than under the signature of a solicitor.

Subsections 94(3)(k) and(o)

(3) For the purposes of this Part, "misconduct" means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes:

…

(k) the breach of any provision of this Act or of any rules made thereunder or any direction or ruling of the Bar Council;

…

(o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

**[9]** The appellants through their letters to both the Bar Council and the disciplinary board gave the following explanation for their action:

(a) the account was a trust account for the first appellant and his business partners only;

(b) the first appellant was a beneficiary of the account and no clients' money was deposited into the account;

(c) the trustees of the account were the first appellant, the late Dato' Harun ldris and Ms Choo;

(d) following the demise of Dato' Harun ldris the remaining trustees are the first appellant and Ms Choo and the first appellant was and still is a solicitor trustee of the account while Ms Choo is a co-trustee and mandated signatory of the account;

(e) the second appellant is not one of the trustees of the account and therefore was not an authorised signatory of the account;

A (f) The cheque was issued by Ms Choo upon the instruction of the first appellant;

(g) The appointment of Ms Choo was as a precaution to prevent embezzlements by lawyers which were rampant at that time (in 1992) and her appointment was also consistent with the provision of s. 78(2)(a) of the Act which reads as follows:

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> 78(2) (a) The Bar Council shall also make rules providing for the opening and keeping by every advocate and solicitor who is a sole trustee, or who is co-trustee with one or more of his partners, clerks or servants, of an account at a bank for moneys of any trust of which he is such a sole trustee or co-trustee.

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(h) Ms Choo's appointment is also in conformity with s. 78(3)(c) of the Act which reads as follows:

> (3)(c) Nothing in this subsection, or in any rules made pursuant to this section, shall:
>
> D
>
> (i) affect any arrangement in writing, whenever made, between an advocate and solicitor and his client as to the application of the client's moneys or interest thereon;
>
> (ii) apply to moneys received by an advocate and solicitor being moneys subject to a trust of which he is a trustee.

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(i) Rule 4(a) of the Rules allows the deposit of trust monies into the client account of the legal firm. Rule 4(a) reads as follows:

> (4) Moneys to be paid into client account.
>
> F There may be paid into a client account:
>
> (a) trust money; …

(j) Under r. 2 of the Rules, the term "solicitor-trustee" means a solicitor who is a sole trustee or who is co-trustee with a partner, clerk or servant of his or with more than one of such persons;

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(k) By reason of the definition of the words "solicitor-trustee" in r. 2 of the Rules to include a clerk or servant, Ms Choo who was the manageress of the legal firm can be a co-trustee cum authorised signatory of the account;

H (l) With regard to r. 11(6) of the Rules relied upon by the Bar Council, it was made under s. 78(1) of the Act whereas the facts of this case come within the ambit of ss. 78(2)(a) and 78(3)(c) of the Act;

(m) The original complainant, Mr Ng, whose identity was initially withheld by the Bar Council from the appellants, was not a client nor employee I of the legal firm. He was the first appellant's personal employee to manage his moneys and those of his business partners;

(n) Mr Ng's complaint was made in *mala fide* because the first appellant had taken civil and criminal proceedings against Mr Ng to recover his monies which were unlawfully misappropriated by Mr Ng; and

(o) The appellants honestly believed that up to this day they had complied with all the rules and provisions relating to legal practice to the best of their ability and the appellants requested the disciplinary board to dismiss this maliciously motivated complaint by Mr Ng.

**[10]** The disciplinary board referred the appellants' explanation to the Bar Council for comments. The Bar Council rejected the explanation on the ground that even if Ms Choo was authorised by the beneficiaries to the account which is subject to proof, s. 78(3)(c) relates to the application of the trust monies but does not relate to the manner in which a client account is to be operated and therefore r. 11(6) of the Rules would still apply. The Bar Council is fortified in its view by s. 82(2) of the Act which prohibits an advocate and solicitor from authorising any unauthorised person to operate any bank account in his name or in the name of his firm and maintained by him or his firm in connection with his practice as an advocate and solicitor. Hence, the Bar Council still maintained that the appellants may be guilty of misconduct under s. 94(3)(k) and/or s. 94(3)(o) of the Act.

**[11]** By a letter dated 29 November 2008 the disciplinary board notified the Bar Council that at a meeting held on 12 November 2008, the disciplinary board had deliberated on the complaint and had resolved to dismiss the Bar Council's complaint. The disciplinary board gave the following reasons for its decision:

(i) The facts showed the appellants authorised an unauthorised person to operate the client account;

(ii) This was a breach of s. 82(2) of the LPA; and

(iii) The appellants' explanation had merits, as there was a conflict between s. 82(2) and s. 78(2) of the Act and r. 11(6) of the Solicitors' Account Rules 1990 and the appellants should be given the benefit of the doubt while the Bar Council should amend s. 78(2)(a) and the Solicitors' Account Rules 1990.

**[12]** Dissatisfied with the decision of the disciplinary board, the Bar Council appealed to the Kuala Lumpur High Court pursuant to s. 103E, in which it sought an order to set aside the decision of the disciplinary board dated 29 November 2008, an order directing the disciplinary board to hold a formal complaint against the appellants and for that purpose to appoint a disciplinary committee to hear and determine the Bar Council's complaint pursuant to s. 100(3) of the Act.

**Decision Of The High Court**

**[13]** The High Court allowed the Bar Council's appeal and granted the orders ought by it and cited the following grounds for her decision:

A (a) The complaint by the Bar Council to the disciplinary board is grounded primarily on the alleged breach of ss. 82(2) and (3) of the Act and r. 11(6) of the Solicitors' Account Rules 1990;

(b) Sections 82(2) and (3) and r. 11(6) of the Solicitors' Account Rules 1990 read as follows:

B **Section 82(2) and (3) of the LPA**

(2) No advocate and solicitor shall authorise any unauthorised person to operate any bank account in his name or in the name of his firm and maintained by him or his firm in connection with his practice as an advocate and solicitor.

C (3) Any advocate and solicitor who has acted in contravention of subsection (1) or (2) may be liable to disciplinary proceedings.

**Rule 11(6) of the Solicitors' Account Rules 1990 states:**

(6) Unless authorised in writing by the Bar Council, no money may be withdrawn from a bank account, being or forming part of a D client account, otherwise than under the signature of a solicitor.

(c) Section 82(2) clearly prohibits an advocate and solicitor from giving authority to an unauthorised person to operate a client account;

(d) Considering the evidence made available to the disciplinary board E it is apparent that the elements which constitute a breach of s. 82(2) of the Act and rule 11(6) of the Rules are present which may amount to a misconduct under s. 94(3)(k) of the Act;

(e) With regard to the contention of the appellants that r. 11(6) of the Solicitors' Clients Account Rules allows the Bar Council to give F written authority for the withdrawal of money in a manner otherwise than in the manner provided by the said rule, it goes without saying that any authority to be given by the Bar Council under the said rule does not include the giving of authority that will result in the contravention of s. 82(2) of the Act;

(f) On the contrary r. 11(6) reflects the intention of s. 82(2) that money G from a bank account that is part of or forming part of a client account can only be withdrawn under the signature of a solicitor;

(g) With regard to s. 78(2)(a) and (b) of the Act which makes provisions for the Bar Council to make rules for the opening and keeping of an account at a bank for moneys of any trust of which an advocate H and solicitor is a sole trustee or is a co-trustee with one or more of his partners, clerks or servants, and for the keeping of accounts of moneys received, held or paid by him for or on account of any such trust, it is obvious that since s. 82(2) is a substantive provision of the Act, the Bar Council cannot make rules under s. 78 that are inconsistent with or in contravention of the Act at the risk of being I declared as *ultra vires* the 'parent Act';

(h) Further no subsidiary legislation can create 'exceptions' to a substantive provision in the 'parent Act' unless power to create such exceptions is expressly provided for by the Act itself;

(i) Hence, while s. 78(2)(a) and (b) of the Act may allow the Bar Council to make rules to allow an advocate and solicitor who is a trustee of a trust client account to have as co-trustee his partner(s), his clerk or his servant, however, in so far as operating a bank account as contemplated in s. 82(2) of the Act, the said section clearly states that no unauthorised person may do so. The words in s. 82(2) are clear and unambiguous;

(j) In forwarding a complaint to the disciplinary board the Bar Council had determined that on the evidence available *prima facie* there is an act of misconduct. It is not the duty of the Bar Council to make findings of fact to establish that the act of misconduct complained of had in fact been established. In the present case, having considered the evidence and the submission the Court found that on the evidence presented to the Disciplinary Board, at the very least there is *prima facie* case of misconduct and the Bar Council's complaint has merit;

(k) The Court was mindful of what the court had said in the case of *Gana Muthusamay v. LM Ong & Co.* [2006] 1 CLJ 88. However, in this case, the Court was constrained to find that the Disciplinary Board had erred in dismissing the Bar Council's complaint as being without merit.

(l) In the premises, the appeal was allowed with costs of RM500 to the Bar Council.

## The Appeal

**[14]** Before us, learned counsel for the appellants raised the following main arguments:

(1) The learned High Court Judge erred in interfering with the decision of the disciplinary board which was made in the exercise of the powers conferred on the disciplinary board as a disciplinary body set up under the Act;

(2) The courts in this country have, in a number of cases laid down the principle with regard to an appeal from a decision of the disciplinary board, that is, the courts should generally be slow to interfere with the decision of the disciplinary board except in very exceptional cases or on the most compelling grounds (see: *Au Kong Weng v. Bar Committee, Pahang* [1980] 1 LNS 4; [1980] 2 MLJ 89 (FC), *Marzaini Zainuddin v. Majlis Peguam Malaysia* [2007] 10 CLJ 339; [2007] 8 MLJ 697 (HC) and *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878; [1998] 3 MLJ 341 (CA)).

(3) In *Au Kong Weng v. Bar Committee, Pahang* Raja Azlan Shah CJ (Malaya) (as he then was) had explained the principle at pp. 91 and 92 of the reported judgment as such:

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> Statues relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than any one else the standards which responsible legal opinion demands of its own profession.

B And further down at p. 92, the learned Chief Justice concludes the judgment of the court as follows:

> A relationship of trust and confidence between the courts and the members of the Bar is essential for the due administration of justice in this country, and that relationship would be impaired if, on any but the most compelling grounds, the courts were to interfere with the finding of the committee in a matter so peculiarly its concern.

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(4) In *Marzaini Zainuddin v. Majlis Peguam Malaysia*, Abdul Malik bin Hj lshak J (as he then was) held at p. 345 (CLJ); p. 705 (MLJ) of the reported judgment:

D

> Disciplinary proceedings ... are designed to enable members of the same profession to decide on the fate of their fellow practitioners. This is simply because members of the same profession should know and appreciate better than anyone else the standards of conduct expected of the legal profession.

E

(5) Further, in *Gana Muthusamy v. Tetuan LM Ong & Co*, Gopal Sri Ram JCA (as he then was) held at p. 881 (CLJ); pp. 344 and 345 (MLJ) of the reported judgment:

F

> lt is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour. Therefore, a court will be entitled to be interfere only if what has been found by a Disciplinary Committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession.

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H (6) In this case the disciplinary board having perused all the documents and facts and circumstances of the case had decided to give the appellants the benefit of the doubt because of its findings that there are inconsistencies in the relevant provisions in the Act and the Rules and the appellants should not be faulted but the Bar Council should take action to remove the inconsistencies.

I

(7) The learned High Court Judge misdirected herself when she considered the appeal as if it was a case requiring her to interpret the various provisions of the Act and the Rules made thereunder and to decide

whether a *prima facie* case had been made out by the Bar Council. She further misdirected herself when she held that since a *prima facie* case has been made out by the Bar Council, it was wrong of the disciplinary board to dismiss the Bar Council's complaint.

(8) It was submitted that the learned High Court Judge erred on principle in her approach. It was submitted that based on the trite principle laid down in the aforesaid authorities, which are binding on her, the proper approach in law in dealing with an appeal emanating from the decision of the disciplinary board, was for the learned High Court Judge to determine whether this was such an exceptional case or there were compelling grounds in this case for her to interfere with the exercise of the disciplinary board's discretion not to proceed with the complaint of the Bar Council, but instead recommended that the Bar Council take steps to amend the law to clarify the legal position.

(9) It was submitted that based on the facts and circumstances of this case, there was absolutely no compelling reason for the High Court Judge to interfere with the exercise by the disciplinary board of its discretion pursuant to the powers conferred on it under the Act in dismissing the complaint of the Bar Council, and the learned High Court Judge erred when she purported to do so.

(10) The appellants in this case had always maintained that the account was a trust account and the operation of the account was within the framework of the Act and the Solicitors' Account Rules 1990, as explained in their letters in reply to the show cause letters issued by the Bar Council and the disciplinary board.

(11) In any case, even if the appellants' action amounted to a breach of s. 82(2) of the Act, s. 82(3), which provides that any advocate and solicitor who has acted in contravention of subsection (1) or (2) may be liable to disciplinary proceedings, clearly gives a discretion to the disciplinary board to decide whether based on the facts and circumstances of any particular case, disciplinary action should or should not be taken against an advocate and solicitor.

(12) The learned High Court Judge erred when she failed to give due recognition to the disciplinary board whose members were senior members of the Bar who were eminently qualified to determine what does and does not amount to professional misconduct among the legal profession. The appellants therefore urged this court to allow this appeal with costs.

**[15]** Learned counsel for the Bar Council, on the other hand submitted that the learned High Court Judge did not err either in law or in fact when she granted the orders of the Bar Council.

**[16]** It was submitted that the only issue here is whether the appellants had contravened s. 82(2) of the Act and r. 11(6) of the Rules. If the answer is yes, then *prima facie* there was a misconduct under s. 94(3)(k). Once a *prima facie* case of misconduct against the appellants has been established, the complaint must be referred to the disciplinary committee for a hearing. In this case, it was too premature for the disciplinary board to summarily dismiss the Bar Council's complaint without referring the complaint to the disciplinary committee for a full hearing because at this stage of the proceedings, the disciplinary board did not have the benefit of the full evidence before it.

**[17]** It was further submitted that all the grounds raised by the appellants in the appeal are more appropriately to be raised before the disciplinary committee during its hearing where the appellants will have the opportunity to give their version and to explain away their contemporary documents and why the complaint should be dismissed.

**Our Decision**

**[18]** It is well settled that an appellate court will not interfere with the decision of the court appealed from unless the findings are clearly wrong or not based on proper appreciation of the evidence or the trial judge had acted on wrong principles (see: *China Airlines Ltd. v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163 (FC), *Eng Thye Plantations Bhd v. Lim Heng Hock & Ors* [2001] 4 CLJ 245 (CA), *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 (FC) and *Sivalingam Periasamay v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 (CA)).

**[19]** Having read the record of appeal and considered the submissions of parties and having regard to the trite principle on appellate intervention with the decision of the disciplinary board as discussed above and the provisions of the Act, in our judgment the learned High Court Judge had erred in principle when she set aside the decision of the disciplinary board and granted the various orders sought by the Bar Council. We say so for the following reasons.

**[20]** As rightly pointed out by learned counsel for the appellants, the disciplinary board is a disciplinary body established under s. 93(1) of the Act.

**[21]** Under s. 93(1), the disciplinary board consists of a chairman appointed by the Chief Judge after consultation with the Bar Council for a term of two years and such person shall be a retired Judge of the High Court or the Court of Appeal or the Federal Court or any other person who is qualified to be a Judge of the High Court or the Court of Appeal or the Federal Court, the President of the Malaysian Bar or any member of the Bar Council as his representative and 15 practitioner members of the Malaysian Bar of not less than ten years' standing appointed by the Chief Judge for a term of two years after consultation with the Bar Council (see s. 93(3)(a), (b) and (c)).

**[22]** Section 94(1) provides that all advocates and solicitors shall be subject for the purposes of all disciplinary actions to the control of the disciplinary board. Section 94(2) provides for the punishments which can be imposed by the disciplinary board and it reads as follows:

> (2) Any advocate and solicitor who has been guilty of any misconduct shall be liable to one or more of the following penalties or punishments:
>
> (a) to be struck off the Roll;
>
> (b) to be suspended from practice for any period not exceeding five years;
>
> (c) to be ordered to pay a fine not exceeding fifty thousand ringgit; or
>
> (d) to be reprimanded or censured

**[23]** The term "misconduct" is defined in s. 94(3) as "any conduct or omission which amounts to grave impropriety" and includes any one of the conducts or omissions listed in paras. (a) to (o) of the said subsection.

**[24]** As stated earlier, the Bar Council relies on s. 94(3)(k) and (o) as set out earlier in this judgment. Under para. 94(3)(k), the Bar Council relied on the appellants' breach of s. 82(2) of the Act which prohibits a legal firm from allowing a person who is not an advocate and solicitor to draw a cheque in respect of moneys standing or forming part of a client account of the legal firm.

**[25]** Section 100 of the Act sets out the procedure to be followed whenever the disciplinary board receives any complaint of any alleged misconduct.

**[26]** For the purpose of this appeal, the following provisions of s. 100 are relevant:

> (1) Where a written application or complaint is made or referred to the Disciplinary Board, the Disciplinary Board shall, if it is satisfied that:
>
> (a) there is no merit in the application or complaint, dismiss the application or complaint and notify the complainant and the advocate and solicitor of its decision; or
>
> (b) there is merit in the application or complaint:
>
> (i) post or deliver to the advocate and solicitor concerned a copy of the application or complaint together with all supporting documents, if any, furnished to the Disciplinary Board; and
>
> (ii) request the advocate and solicitor to furnish his written explanation in quadruplicate together with supporting documents, if any, within fourteen days of the request or within such longer time as the Disciplinary Board may allow.
>
> …
>
> (3) Where the advocate and solicitor has furnished his written explanation to the Disciplinary Board under subparagraph (1)(b)(ii), the Disciplinary Board shall review the matter and:

A (a) if it is satisfied that there is no merit in the application or complaint, dismiss the application or complaint and notify the parties accordingly; or

(b) if it is still of the view that there is merit in the application or complaint, proceed to appoint a Disciplinary Committee.

B …

(14) The Disciplinary Board may, at any stage of an inquiry into an application or complaint, determine that a formal inquiry is required and appoint a Disciplinary Committee accordingly.

C (15) Nothing in this section shall preclude the Disciplinary Board from dismissing an application or complaint at any stage.

**[27]** A disciplinary committee, on the other hand, is a body appointed by the disciplinary board in the course of a disciplinary proceedings. A disciplinary committee will be appointed in the circumstances stated in s. 103A of the Act, which reads as follows:

D (1) Where:

(a) the Disciplinary Board determines that a Disciplinary Committee ought to be appointed;

E (b) an advocate and solicitor has been convicted of an offence of criminal breach of trust under section 409 of the Penal Code or any other offence involving fraud or dishonesty; or

(c) the advocate and solicitor has been suspended under subsection 94(4), the Disciplinary Board shall, as soon as may be practicable, appoint a Disciplinary Committee.

F **[28]** A disciplinary committee consists of three members of whom two shall be advocates and solicitors and one a lay person, appointed from amongst the disciplinary committee panel appointed under s. 96 (see s. 103A(2)).

G **[29]** By virtue of ss. 103B and 103C, the role of a disciplinary committee is to hold an inquiry and to make its findings and make any one of the following recommendations to the disciplinary board:

(a) That no cause for disciplinary action exists and that the application or complaint be dismissed;

H (b) That cause for disciplinary action exists but is not of sufficient gravity to warrant any punishment other than a reprimand or censure or that the circumstances are such that the advocate and solicitor should only be reprimanded or censured; or

(c) That cause for disciplinary action exists and is of sufficient gravity I to warrant the advocate and solicitor to be subject to one or more of the following penalties or punishments:

(i) reprimand or censure;

(ii) imposition of a fine not exceeding fifty thousand ringgit;

(iii) suspension of the advocate and solicitor from practice, or in the case of a foreign lawyer, recommendation to the Bar Council for suspension of registration, for such period not exceeding five years as the Disciplinary Committee deems appropriate in the circumstances; or

(iv) striking the advocate and solicitor off the Roll or in the case of a foreign lawyer, recommendation to the Bar Council for revocation of the registration of the foreign lawyer.

(2) The Disciplinary Committee may in appropriate cases in addition to its recommendation of an appropriate penalty or punishment recommend that the Disciplinary Board make an order of restitution by the advocate and solicitor of the complainant's monies if it is established that such monies were or are held by the advocate and solicitor in his professional capacity and the complainant is entitled to the return of such monies or part thereof.

**[30]** Nevertheless, by virtue of s. 103D the disciplinary board is not bound to accept the recommendations of a disciplinary committee. Section 103D reads as follows:

(1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason for the rejection.

(2) The Disciplinary Board may in appropriate cases impose a greater or lesser penalty or punishment than that recommended by the Disciplinary Committee.

(3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.

(4) Before the Disciplinary Board makes an order that is likely to be adverse against an advocate and solicitor under subsection (2) or (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

**[31]** Reverting to the appeal before us, having regard to the statutory provisions of the Act as set out above, it is clear that the factual scenario here does not fall under the circumstances specified in s. 103A(1)(b) and (c), where the appointment of a disciplinary committee is compulsory, but under the circumstance in s. 103A(1)(a) to be read with 100(3)(b), that is, where the disciplinary board determines that the complaint has merit and a disciplinary committee ought to be appointed to inquire into the complaint.

**[32]** It is also clear from its decision conveyed to the Bar Council that the disciplinary board obviously did not think that it ought to refer the complaint to a disciplinary committee for an inquiry to be held. Instead, the disciplinary board after reviewing the explanation of the appellants had decided that there was no merit in the application and had exercised its power under s. 100(3)(a) to dismiss the complaint of the Bar Council.

**[33]** Having regard to the various provisions of the Act relating to the statutory powers of the disciplinary board, the trite legal principle on appellate intervention with the decision of the disciplinary board as set out above, and the factual matrix in this case, we are not in a position to say that the disciplinary board's decision was plainly wrong or perverse. Neither are we in a position to say that this is such an exceptional case or there are such compelling grounds for the High Court to interfere with the disciplinary board's decision not to proceed with the complaint.

**[34]** It is our further view that the learned High Court Judge, in purporting to compel the disciplinary board to proceed with disciplinary action against the appellants and requiring it to appoint a disciplinary committee to inquire into the matter, failed to appreciate the provisions of the Act and would appear to have usurped the statutory power of the disciplinary board, especially its power to determine when a disciplinary committee should be appointed as well as its power to dismiss a complaint at any stage of the proceedings.

**[35]** As rightly pointed out by Raja Azlan Shah CJ (Malaya) (as he then was) in *Au Kong Weng v. Bar Committee, Pahang*, the relationship of trust and confidence between the courts and the members of the Bar is essential for the due administration of justice in this country, and that relationship would be impaired if, on any but the most compelling grounds, the courts were to interfere with the findings of the disciplinary board in a matter so peculiarly its concern.

**[36]** For the reasons above, we allowed the appeal and set aside the order of the High Court with no order as to costs. The deposit was ordered to be refunded.